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No. 02-1662

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IN THE

Supreme Court of the United States

PETER G. LOEWENSTEIN and HELEN LOEWENSTEIN,

Petitioners,

v.

CITY OF LAFAYETTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the California Court of Appeal properly applied the "normal delay" doctrine to reject Petitioners' temporary takings claim for the period during which they pursued litigation challenging the legality of the City's denial of their lot line adjustment application, where the Court of Appeal concluded that the City's actions were objectively reasonable under state law.

2. Whether this Court should re-weigh the Court of Appeal's determination that the City's denial of Petitioners' lot line adjustment application substantially advanced a legitimate governmental interest, where that determination by the state court was based on its interpretation of state law and evidence in the record.

3. Whether *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), requires payment of takings compensation for the denial of a lot line adjustment application, where the trial court concluded the denial was invalid and the City elected to grant the lot line adjustment rather than litigate the issue further.

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Respondent, the City of Lafayette ("City"), respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the California Court of Appeal in this case.

STATEMENT OF THE CASE

California's state law regulating the subdivision of land (the Subdivision Map Act) excepts from its requirements certain applications for the adjustment of lot lines between existing adjacent parcels. Petitioners, who purchased a very small and inexpensive parcel of land, argued that under the terms of this lot line adjustment exception, the City had no choice but to allow them to dramatically increase the size of the small lot using large amounts of land taken from certain adjacent parcels that could not themselves legally be subdivided. Petitioners' plans to expand and then develop the small parcel were temporarily delayed while Petitioners pursued state court litigation regarding the legality and reasonableness of the City's position that the lot line adjustment exception did not apply to the unique circumstances of this case.

Petitioners were ultimately allowed, by the City, to adjust the lot lines as proposed, but sought temporary takings damages for development delay. The California Court of Appeal dismissed Petitioners' takings claim because, although the trial court found the City's interpretation of the Subdivision Map Act to be erroneous, the City's actions were objectively reasonable given the unique facts of this case. Under the well-established normal delay doctrine in takings law, a plaintiff who suffers development delay as the result of such an objectively reasonable governmental action is not entitled to takings compensation.

The Petition for a Writ of Certiorari presents a fact-intensive and meritless challenge to the state court's conclusion that the City's actions were reasonable and legitimate. The Petition also posits a series of nonexistent inter-jurisdictional conflicts of authority and conflicts with decisions of this Court in an effort to convince this Court to grant review. Such review is not appropriate because Petitioners' objections to the Court of Appeal's decision relate principally to issues of fact and interpretation of state law. Moreover, none of the conflicts alleged by Petitioners actually exist.

BACKGROUND

A. CALIFORNIA SUBDIVISION MAP ACT.

California regulates the subdivision of land through a statute known as the Subdivision Map Act. Cal. Gov't Code §§ 66410-66499.37 (West 2003). At all times relevant for this litigation, the Subdivision Map Act contained an exception covering proposed lot line adjustments between "existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created. . . ." Cal. Gov't Code § 66412(d) (West 2001). Whereas the Subdivision Map Act "provides opportunities for neighborhood input on the effects of development and detailed study of all impacts on the community," the lot line adjustment procedure is summary in nature. Petition for a Writ of Certiorari ("Pet.") Appendix ("App.") at 20. Accordingly, in considering a lot line adjustment application, a local agency would be required to "limit its review and approval to a determination of whether or not the parcels

resulting from the lot line adjustment will conform to local zoning and building ordinances." Cal. Gov't Code § 66412(d).

B. PETITIONERS' PLAN TO AVOID THE REQUIREMENTS OF THE SUBDIVISION MAP ACT.

Petitioners have, since approximately 1984, resided in a 4,400 square-foot home on a three-acre hillside lot in the City ("homesite parcel"). In 1996, Petitioners purchased for $13,500 a very small (approximately 0.1 acre) parcel adjoining their homesite parcel ("tank parcel"). *See* Appendix A, Fig. 1.[1] Petitioners' idea was to seek to enlarge that tank parcel significantly through the addition of approximately two acres taken from their homesite parcel and a small portion of a neighbor's parcel. *See* Appendix A, Fig. 2. Petitioners proposed to complete this reconfiguration utilizing the above-described summary lot line adjustment exception to the Subdivision Map Act.

The trouble with Petitioners' plan lay in the fact that the land they proposed to carve out for addition to the tank parcel was part of a 4-unit subdivision created in 1977, subject to the express condition that it not be further subdivided. Pet. App. at 2. The tank parcel lay outside of that subdivision.

One of the more striking and valued characteristics of the City is its hillsides, and, as the Court of Appeal observed,

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1. The drawings attached hereto as Appendix A were prepared based on information in the record, and are included herewith pursuant to Supreme Court Rules 14(1)(i) and 15. The City originally submitted the drawings to the Court of Appeal for ease of understanding the facts. Petitioners raised no objections to the drawings.

"[h]illside properties require particular oversight." *Id.* at 20. The City has, therefore, carefully designed and administered local land use regulations to limit hillside development, protect hillside resource values and guard against the adverse impacts of inappropriate hillside development.

Petitioners' lot line adjustment application was cause for concern because the City recognized that the proposal to split off land from within the 1977 subdivision to enlarge the tank parcel would effectively allow a fifth building site within the 1977 subdivision, which was expressly limited to four houses. This would violate the conditions imposed on the 1977 subdivision. On the advice of its City Attorney, therefore, the City denied Petitioners' lot line adjustment application. *Id.* at 25 (City "believed the adjustment would create an extra lot in a restricted subdivision and . . . violate municipal ordinances regarding hillside property").

Petitioners challenged the City's determination that the Subdivision Map Act's lot line adjustment exception did not apply. The trial court noted that it was faced with a "very close and . . . difficult case," but ultimately concluded that the City erred as a matter of state law in denying Petitioners' application. Pet. App. at 8, 28. The City decided not to appeal that issue, and instead granted Petitioners' lot line adjustment application. *Id.* at 12.

C. PETITIONERS' TAKINGS CLAIM.

Because the City granted Petitioners' lot line adjustment, the narrow issue decided by the Court of Appeal was whether Petitioners were entitled to recover temporary takings damages for the period during which the City's denial of their lot line adjustment application was in effect. The Court of

Appeal's decision reversed the $611,666.66 trial court takings award because it concluded that under clearly applicable California Supreme Court precedent, *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188 (Cal. 1998), *cert. denied* 525 U.S. 876 (1998), the City's denial of the lot line adjustment application, even if erroneous, did not give rise to temporary takings damages.[2]

Landgate holds that a legally erroneous but objectively reasonable governmental action taken to advance a legitimate governmental interest will not occasion a compensable constitutional taking, even if it has the effect of delaying a land owner's development plans.[3] *Landgate*, 953 P.2d

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2. As Petitioners note, the trial court awarded permanent takings damages. Pet. at 13-14. The City subsequently exercised its discretion to approve the lot line adjustment, converting any taking, if one occurred, to a temporary rather than a permanent taking. Because the Court of Appeal found no taking had occurred, the record does not indicate what the value of a temporary taking would be.

3. *Landgate* involved the developer of a large home in the Malibu Hills who sought takings damages from the California Coastal Commission, which erroneously asserted jurisdiction over a lot line adjustment necessary for development. *Landgate*, 953 P.2d at 1190, 1193. The California Supreme Court found that

> Landgate [had] not demonstrated that the development delay . . . was due to anything other than a bona fide dispute over the legality of Landgate's lot and the Commission's jurisdictional authority over the lot line adjustment. Such delay is an incident of property ownership and not a taking of property. Although Landgate was in the unfortunate position of suffering from a delay not of its own making, the same can be

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at 1197. This Court denied the petition for a writ of certiorari filed in *Landgate*, 525 U.S. 876 (1998). The City of Lafayette was not liable for a temporary taking under the *Landgate* doctrine because its application of the Subdivision Map Act to the particular facts of this case was not "so objectively unreasonable as to give rise to the inference that [the City] was adopting that position solely for purposes of delay or some other illegitimate reason." *Landgate*, 953 P.2d at 1200; Pet. App. at 22-27.

REASONS FOR DENYING THE PETITION

Petitioners have presented a lengthy and convoluted Petition for a Writ of Certiorari based on a number of meritless and potentially misleading arguments. The City's best efforts to decipher the Petition indicate that Petitioners are seeking to convince this Court that certiorari is appropriate based on their arguments that the Court of Appeal's decision in this case: (1) was based on inaccurate factual determinations and an improper interpretation of state law; (2) conflicts with a Wisconsin Supreme Court case; and (3) conflicts with various takings decisions of this Court. For the reasons addressed below, none of Petitioners' arguments provides anything approaching sufficient grounds for review by this Court, and the Petition for a Writ of Certiorari should be denied.

(Cont'd)

> said of any governmental mistake or, for that matter, any of a number of possible bottlenecks in the development process.

Id. at 1204 (citations omitted). On that basis, this Court concluded that the California Coastal Commission was not liable for any takings damages. *Id.*

A. PETITIONERS ARE SEEKING REVIEW OF FACTUAL DETERMINATIONS AND INTERPRETATIONS OF STATE LAW.

The central issue before the Court of Appeal was the evaluation of the objective reasonableness of the City's interpretation and application of the lot line adjustment exception to the Subdivision Map Act to the unique facts of this case. Petitioners alleged that the City's denial of the lot line adjustment application was so objectively unreasonable and unsupportable as to lead to the conclusion that it was taken for improper reasons (e.g., to delay development). Pet. App. at 24. The City argued that even if its interpretation of the state law were erroneous, it was nonetheless reasonable in light of the circumstances. *Id.* at 24-25.

After carefully considering the language and goals of the state statute and case law interpreting it, the Court of Appeal concluded that the City's action, even if erroneous, was not so unreasonable as to give rise to takings liability. *Id.* at 25-26. The Court of Appeal concluded that in denying Petitioners' application, the City "attempted to do no more than what the [lot line exception to the Subdivision Map Act] allows – ensure conformance with local zoning and building restrictions." *Id.* at 25. The Petition for a Writ of Certiorari would have this Court review that interpretation and application of state law. *See* Pet. at 20-21. Such review is not an appropriate basis for certiorari. 28 U.S.C. § 1257 (2000); Sup. Ct. R. 10.

Just as importantly, Petitioners devote approximately ten (10) pages of their Petition to an extended recitation of their version of the facts of this case. *See* Pet. at 7-16. This insistence on offering a statement of the facts that differs

from the description in the Court of Appeal's decision is entirely inappropriate at this late stage of litigation and illustrates that Petitioners' objection to the Court of Appeal decision is largely a factual dispute. Supreme Court review of that factual dispute is not warranted.

Petitioners also mischaracterize and shade the facts of this case throughout their Petition. Because these misstatements of facts bear on the issues that would be before this Court if certiorari were granted, the City is obligated to address them here. Sup. Ct. R. 15(2).

Petitioners repeatedly assert that the City's denial of their lot line adjustment application "was found to have been without any support or justification and to have failed to substantially advance any legitimate government interest." Pet. at 1; *see also id.* at 10, 12. This assertion is inaccurate and misleading because it is based on a trial court conclusion that was reversed on appeal. As the Court of Appeal explained, there was no substantial evidence in support of the trial court's finding that the City was not pursuing a legitimate governmental interest. Pet. App. at 19. To the contrary, even assuming the City's denial of the lot line adjustment application was erroneous, it was rational, not legally unreasonable or logically deficient. *Id.* at 15, 25-26. Its actions were taken in good faith, comported with the purposes of the Subdivision Map Act and advanced the City's legitimate interests, including its interest in protecting hillsides and enforcing the conditions in its prior land use approval (the 1977 subdivision). *Id.* at 24-26; *see also id.* at 9.

Petitioners repeatedly assert that the City denied their "development application" for the tank parcel.

See, e.g., Pet. at 3, 9, 11. This assertion is inaccurate and inconsistent with Petitioners' own prior acknowledgment that their lot line adjustment application did not constitute a development application for the tank parcel. It is well established that a takings claim will not be considered ripe for adjudication until the plaintiff has obtained "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *see Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Petitioners are apparently attempting to blur the critical distinction between their lot line adjustment application, which would only change lines on a recorded map, and the "development application" prerequisite to ripeness, in the hope that they may avoid a conclusion by this Court that their takings claim is not ripe.[4] The ripeness issue would be before this Court if it were to grant certiorari and is an alternate basis for dismissing Petitioners' takings claim.

Petitioners also assert that the lot line adjustment they sought was the only means of supplying access and utilities to the tank parcel. Pet. at 9, 10, 29. This is not accurate. Petitioners could have pursued other options for developing the parcel, but elected not to.[5] Pet. App. at 21 (Court of Appeal

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4. The Court of Appeal expressly declined to reach the ripeness issue because it disposed of the case on other grounds. Pet. App. at 28 n.14.

5. For example, Petitioners could have applied for a two-way lot line adjustment between their homesite parcel and the neighboring parcel in the 1977 subdivision. *See* Appendix A, Fig. 3. Such a two-

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decision noted Petitioners "were not prevented from building a residence on the tank parcel if they could supply access and were not prevented from supplying an access."); *see also* Appendix A, Figs. 3 and 4.

Petitioners erroneously imply that they purchased the tank parcel based in part on the City's representation that they, as adjoining land owners, should buy that land and use the lot line adjustment process to enlarge it. Pet. at 8, 10. Specifically, Petitioners point to a report from City staff that recommended the City decline to purchase the tank parcel from the East Bay Municipal Utility District. *Id.* at 8. This short staff memorandum is general in nature and naturally includes no analysis of any of the complex legal issues raised by the unusual lot line adjustment Petitioners ultimately requested. The City did not, as Petitioners imply, represent that it would approve any lot line adjustment sought by Petitioners.

Finally, Petitioners incorrectly imply that the City's denial of their lot line adjustment application was a departure from its approval of numerous other lot line adjustment applications over the years. Pet. at 9. As the Court of Appeal explained in its decision, Petitioners have not identified even a single example of a City-approved lot line adjustment that contravened the conditions imposed on an existing subdivision, as the lot line adjustment requested by Petitioners did. Pet. App. at 19. As such, it is disingenuous for Petitioners to represent that the City's denial of their lot line adjustment application was inconsistent with prior practice.

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way adjustment would have ensured the necessary access to the tank parcel without drawing another lot within the original boundaries of the 1977 subdivision.

As the foregoing makes clear, the Petition for a Writ of Certiorari is based in large part on inaccurate factual representations, and Petitioners are essentially asking this Court to revisit and reopen the factual inquiry already completed in the state courts.

B. THERE IS NO FEDERAL QUESTION CONFLICT BETWEEN THE CALIFORNIA APPEAL COURT'S DECISION IN THIS CASE AND THE WISCONSIN SUPREME COURT'S *EBERLE* DECISION.

Petitioners attempt to justify certiorari based on a nonexistent "federal question" conflict between the Court of Appeal's decision in this case and an opinion of the Wisconsin Supreme Court, *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730 (Wis. 1999). Pet. at 2, 16, 21-22 (citing Sup. Ct. R. 10(b)). There is, however, no such conflict, because the Wisconsin Supreme Court did not actually decide any federal question in *Eberle*.

The plaintiffs in *Eberle* advanced both federal and state claims for compensation based on an alleged temporary regulatory taking. *Eberle*, 595 N.W.2d at 734. In addressing the plaintiffs' state law claim, the Wisconsin Supreme Court concluded that the plaintiffs had "stated a valid claim for a temporary regulatory taking under Article I, [section] 13 of the Wisconsin Constitution." *Id.* at 741. Unlike other jurisdictions that have confronted the issue, the Wisconsin Supreme Court declined to incorporate into Wisconsin state law the rule followed by numerous other jurisdictions, including California. *Id.* at 742 n.25 (declining to follow *Landgate*); *see infra* at 14-15 (citations to other jurisdictions'

cases).[6] Because the plaintiffs in *Eberle* were able to obtain compensation under the Wisconsin State Constitution pursuant to their state takings claims, the court properly concluded that their federal claims under 42 U.S.C. § 1983 were not ripe for review, and upheld the lower court's dismissal of those claims. *Id.* at 745 (citing *Williamson County*, 473 U.S. at 195). As a result, the Wisconsin Supreme Court's *Eberle* case did not address, much less decide, the plaintiffs' federal temporary takings claim. Because *Eberle* did not decide that federal question, there is no basis for Petitioners' assertion that the *Eberle* decision conflicts with the decision in this case.[7]

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6. The *Eberle* decision reflects some misunderstanding on the part of the Wisconsin Supreme Court regarding the rule articulated in *Landgate*. The *Eberle* decision describes *Landgate* as adopting a per se rule "that when an agency's erroneous action is reversed by a court, there is no taking. . . ." *Eberle*, 595 N.W.2d at 742 n.25. In fact, the *Landgate* rule specifically provides that an agency action reversed by a court can constitute a taking if that action is not only erroneous but objectively unreasonable. 953 P.2d at 1199-1200.

7. Petitioners also argue that this case conflicts with the *Eberle* holding that the regulatory action at issue denied the property owner "all or substantially all practical uses" of its property because it had the effect of blocking physical access to that property. Pet. at 28-29; *Eberle*, 595 N.W.2d at 740. In addition to being fact-based, that holding, like the other holdings of *Eberle*, does not implicate a federal question and therefore could not give rise to a conflict appropriate for Supreme Court review. Moreover, the City's denial of the lot line adjustment application here did not block access to the tank parcel. Petitioners had available, but chose not to pursue, other options for obtaining such access. *See supra* at 9-10, Appendix A, Figs. 3 and 4. Those options render Petitioners' takings claim not ripe for adjudication. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 619-21 (2001); *MacDonald, Sommer & Frates*, 477 U.S. at 348; *Williamson*

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C. THE CALIFORNIA APPEAL COURT'S DECISION COMPORTS WITH THIS COURT'S WELL-ESTABLISHED TAKINGS JURISPRUDENCE.

Petitioners argue that this Court should grant certiorari in this case because it offers the opportunity to "elaborate on," "clarify" and "unambiguously define" its prior takings decisions with regard to the concepts of what constitutes "normal" delay, "a legitimate state interest" and "deprivation of all economically feasible use of property." Pet. at 2, 21, 23. In fact, each of these concepts is already clearly articulated and understandable as it relates to this case. As such, Petitioners' argument that this case offers the Court the opportunity to "clarify" its takings jurisprudence is nothing more than an invitation to issue an improper and unnecessary advisory opinion. Petitioners also advance meritless arguments that the Court of Appeal's decision conflicts with the following decisions of this Court: *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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County, 473 U.S. at 186 (takings claims not ripe where plaintiff has not obtained final determination regarding the type and intensity of permissible development).

1. THERE IS NO CONFLICT BETWEEN THE CALIFORNIA APPEAL COURT'S DECISION AND THIS COURT'S *FIRST ENGLISH* DECISION.

In *First English*, this Court held for the first time that governments are obligated to compensate land owners who suffer a temporary regulatory taking of their property. 482 U.S. at 321 ("where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective"). The Court specifically noted, however, that its holding did not extend to the quite different question of whether land owners are entitled to temporary takings damages for "normal delays" in the development process. *Id.*; *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 328-29 (2002). Such delays are an incident of property ownership and are not a taking. *Agins*, 447 U.S. at 263 n.9 (citation omitted).

In the decade and a half since *First English* was decided, innumerable jurisdictions have interpreted and applied the "normal delay" exception to the temporary takings compensation requirement. Those jurisdictions have overwhelmingly followed *First English* by recognizing that reasonable but erroneous governmental actions (i.e., good faith mistakes) that cause development delay do not give rise to temporary takings liability. *See, e.g.*, *Cannone v. Noey*, 867 P.2d 797, 801 n.8 (Alaska 1994); *Jacobi v. City of Miami Beach*, 678 So. 2d 1365, 1367 (Fla. Dist. Ct. App. 1996); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1275-77 (Mass. 1992), *cert. denied*, 508 U.S. 909 (1993); *Torromeo v. Town of Fremont*, 813 A.2d 389, 392 (N.H. 2002),

cert. denied, 123 S. Ct. 2283 (2003); *Dumont v. Town of Wolfeboro*, 622 A.2d 1238, 1244 (N.H. 1993); *Smith v. Town of Wolfeboro*, 615 A.2d 1252, 1257-58 (N.H. 1992); *Griffith v. State of New Jersey*, 775 A.2d 54, 60-62 (N.J. 2001), *cert. denied*, 534 U.S. 1161 (2002); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343-44 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002); *Lujan Home Builders, Inc. v. Town of Orangetown*, 568 N.Y.S.2d 850, 851 (Sup. Ct. 1991); *Miller & Son Paving, Inc. v. Flumstead Township*, 717 A.2d 483, 487 (Pa. 1998), *cert. denied*, 525 U.S. 1121 (1999); *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 548 S.E.2d 595, 604-05 (S.C. 2001); *Chioffi v. City of Winooski*, 676 A.2d 786, 788-89 (Vt. 1996); *Tabb Lakes, Inc. v. United* States, 26 Cl. Ct. 1334, 1354 (1992); *1902 Atlantic, Ltd. v. United States*, 26 Cl. Ct. 575, 581-82 (1992).

The California Supreme Court adopted this widely held interpretation of the "normal delay" exception in *Landgate*, 953 P.2d at 1203. California's courts have subsequently applied the rule to various factual situations, including in this case. *See, e.g., Encinitas Country Day School v. California Coastal Comm'n*, 133 Cal. Rptr. 2d 551 (2003); *Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (2002); *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Ct. App. 1999), *cert. denied*, 531 U.S. 827 (2000); *Calprop Corp. v. City of San Diego*, 91 Cal. Rptr. 2d 792 (Ct. App. 2000); *Buckley v. California Coastal Comm'n*, 80 Cal. Rptr. 2d 562, 576-77 (Ct. App. 1998), *cert. denied*, 528 U.S. 816 (1999); *see also North Pacifica, LLC v. City of Pacifica*, 234 F. Supp. 2d 1053, 1064-65 (N.D. Cal. 2002). Petitioners incorrectly characterize *Landgate* as having totally eliminated the availability of temporary takings damages in California. Pet. at 1, 18-20. That is not the case. Such damages are

available and have been awarded to plaintiffs whose projects are delayed due to objectively unreasonable and erroneous governmental action. *See Ali*, 91 Cal. Rptr. 2d at 464-65 (temporary takings damages appropriate under *Landgate* because City's denial of demolition permit was "arbitrary and unreasonable" under state law).

As even Petitioners acknowledge, the Court of Appeal's decision is a straightforward application (i.e., not an expansion) of the "normal delay" rule in *Landgate* to the particular facts of this case. Pet. at 1. Petitioners simply disagree with the widely adopted "normal delay" rule and ask this Court to grant certiorari in order to reverse it. *Id.* at 16-21. Such a reversal would be inappropriate because the "normal delay" rule is acknowledged in *First English* as an exception to temporary takings liability. Moreover, such a reversal would have a significant chilling effect on the valid and appropriate exercise of local land use powers. Recognizing this, this Court has properly declined to review *Landgate* and numerous similar decisions from California and other jurisdictions. 525 U.S. 876 (1998); *see also* certiorari-denied cases in two preceding paragraphs.

2. THERE IS NO CONFLICT BETWEEN THE CALIFORNIA APPEAL COURT'S DECISION AND THIS COURT'S *AGINS* AND *NOLLAN* DECISIONS.

In describing the City's denial of Petitioners' lot line adjustment application, the Court of Appeal concluded that under state law, the denial was reasonable (even if it was erroneous) because it furthered the City's legitimate regulation of hillside development, furthered public input and was calculated to "ensure conformance with local

zoning and building restrictions." Pet. App. at 19-20, 25-26. These conclusions are supported by substantial evidence in the record and are consistent with this Court's recent recognition of the importance of local land use planning and the fact that such activities result in non-compensable development delay. *See Tahoe-Sierra*, 535 U.S. 302.

Petitioners' argument that this case conflicts with *Agins* and *Nollan* is actually a thinly veiled attempt to have this Court second-guess the California state court's conclusion regarding the legitimacy of the City's actions under state law.[8] Pet. at 22-27. Notwithstanding the Court of Appeals' clear contrary conclusion, Petitioners argue that the City's denial of the lot line adjustment application did not substantially advance legitimate governmental goals such as hillside protection and the enforcement of conditions placed on land use approvals like the 1977 Subdivision. *Id.*; Pet. App. at 25-26. Petitioners also argue that the City would have advanced more legitimate governmental interests by approving the proposed lot line adjustment. Pet. at 10, 25-26 (positing governmental interest in enlarging small parcels like the tank parcel to accommodate development of very large homes like those in the surrounding neighborhood). Petitioners would like this Court to conduct its own factual inquiry and second-guess a

8. It should be noted that this Court has raised substantial doubt as to whether the "substantially advance" test articulated in *Nollan* and *Agins* has any role in takings law, outside the context of exactions. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 540-47, 554-58 (1998) (majority of Justices rejected the plurality's takings analysis and held that the due process clause – not the takings clause – is the proper context for analyzing the validity of governmental action based on a means-end inquiry); *see also City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 704 (1999).

published state court decision regarding the proper interpretation of the state Subdivision Map Act and the legitimacy of the City's application of that statute. These are not appropriate grounds for granting Petitioners' Petition for a Writ of Certiorari. *See Tahoe-Sierra*, 535 U.S. at 333-34 (declining to reconsider findings that government "acted diligently and in good faith" and took actions that "represented a proportional response to a serious risk of harm").

3. THERE IS NO CONFLICT BETWEEN THE CALIFORNIA APPEAL COURT'S DECISION AND THIS COURT'S *LUCAS* DECISION.

Again asserting a nonexistent conflict, Petitioners urge this Court to grant certiorari in order to "add precision" to its "deprivation of all economically feasible use" rule articulated in *Lucas*, 505 U.S. 1003. Pet. at 27-29. That test is wholly irrelevant in this case, however, because there has not been and could be no finding that Petitioners were deprived of all economically feasible use of the tank parcel. Pet. App. at 26-27. As noted, *supra* at 9-10, the City's denial of the lot line adjustment did not prevent Petitioners from using and developing the tank parcel and did not prevent them from supplying access and utilities to that parcel through means other than the specific lot line adjustment requested. As such, there is absolutely no merit to Petitioners' assertion that they were denied all economically feasible use of their property, and no merit to their claim that this case is therefore governed by *Lucas*.[9]

9. Petitioners' request that the Court use this case to clarify its "deprivation of all economically feasible use" doctrine also ignores the fact that this Court's recent opinion in *Tahoe-Sierra*, 535 U.S. at 328-35, does just that.

CONCLUSION

In view of the foregoing, the City respectfully requests that the Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

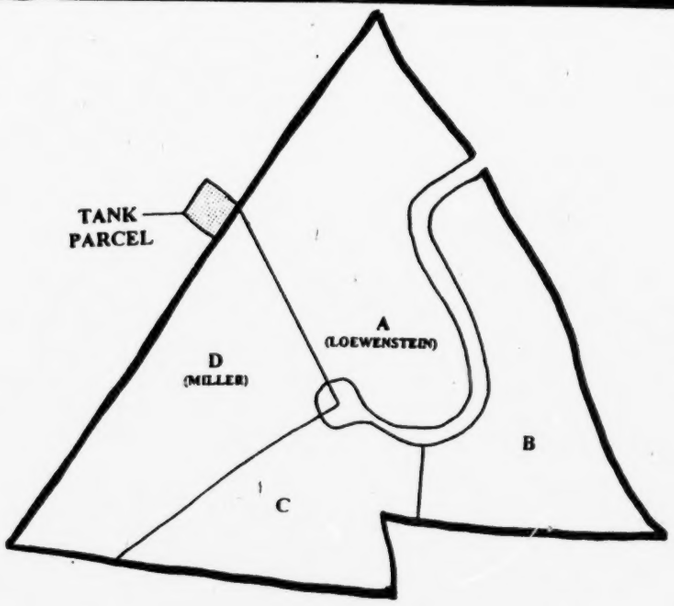

FIG 1: 1977 SUBDIVISION (MSL 7-77) AND TANK LOT PRIOR TO 2001 LOT LINE ADJUSTMENT

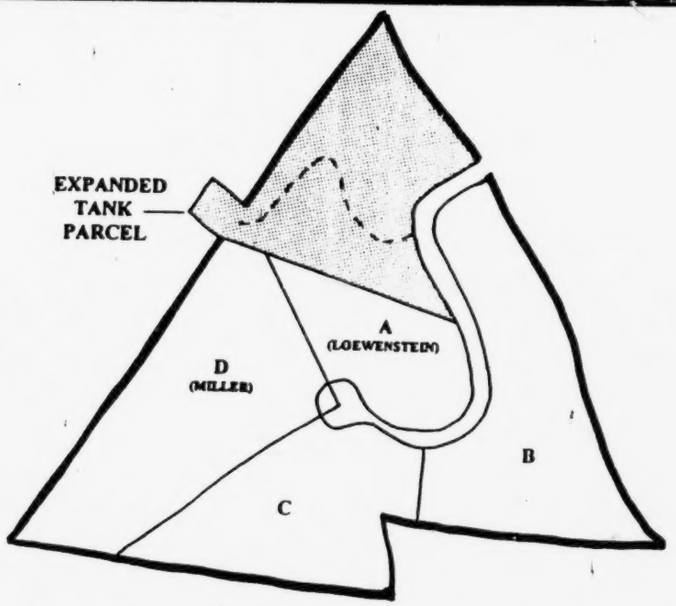

FIG 2: LOT LINE ADJUSTMENT PROPOSED BY RESPONDENTS (as granted by City in 2001)

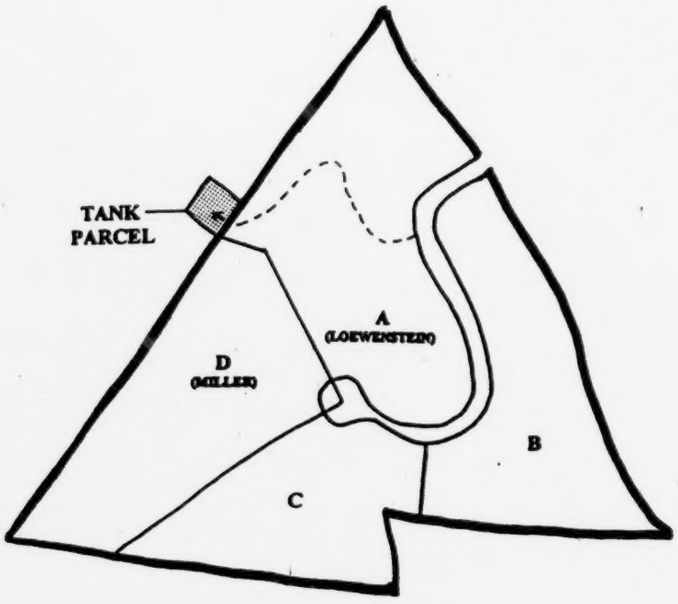

FIG 3: 2-WAY LOT LINE ADJUSTMENT OPTION

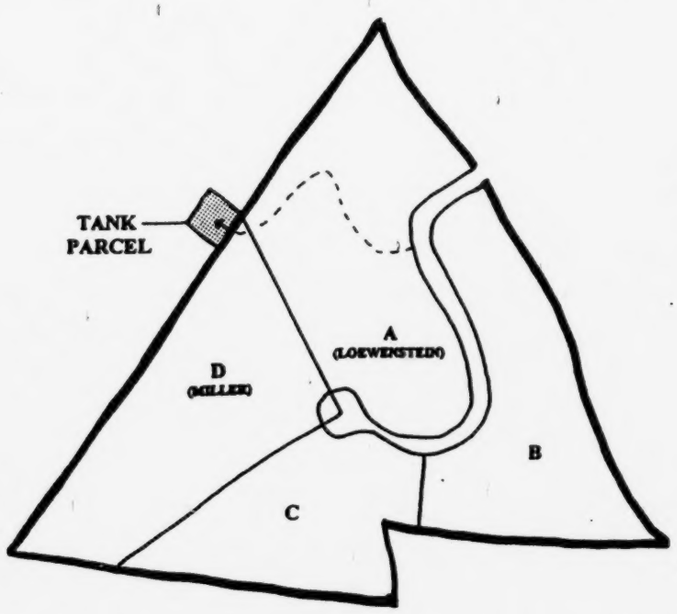

FIG 4: EASEMENT OPTION

1977 Subdivision Boundary
Lot Line
Possible Access Route
* Not to Scale

These drawings have been prepared for the convenience of the Court based on information in the record. See Trial Exhibits 9A, 16A, 16B.